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No. 91-1997

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In The

Supreme Court of the United States

October Term, 1992

HEATHER LEIGH BOGGS and
MISTY LEIGHANN BOGGS
b/n/f DIANE BOGGS ARRINGTON and
RICHARD D. BOGGS b/n/f SARA A. CRITCHER,

Petitioners,

vs.

ELTON EUGENE JONES,
Sheriff of Troup County, Georgia,
and TROUP COUNTY, GEORGIA,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the failure to remove or cover a pipe which previously had been used by an inmate to commit suicide, uncoupled with any knowledge of a subsequent inmate's suicidal intentions, constitutes deliberate indifference as to the subsequent inmate in violation of the Fourteenth Amendment.

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OPINIONS BELOW

Petitioners have provided the decision of the United States Court of Appeals for the Eleventh Circuit in *Boggs v. Jones*, No. 91-8701, slip op. (11th Cir., April 21, 1992), and have provided the Order of the Honorable G. Ernest Tidwell, Judge, United States District Court for the Northern District of Georgia, entered on July 22, 1991 as Appendix A and Appendix B, respectively, to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Respondents do not disagree with the first paragraph of petitioners' statement of jurisdiction.

As to the second paragraph, respondents disagree that there is "a split of authority among the circuits" or that "an important question of federal law" is involved in these proceedings. However, respondents show that jurisdiction is conferred by 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondents agree that this action involves the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983 but deny owing any liability to petitioners thereunder.

STATEMENT OF THE CASE

Petitioners in these proceedings were the plaintiffs in the district court, Heather Leigh Boggs, Misty Leighann Boggs and Richard D. Boggs. The three petitioners, who bring the underlying action by next friend, are the minor children of Richard Lee Boggs (hereinafter alternately referred to as "the deceased" or "Boggs"). Elton Eugene Jones, the Sheriff of Troup County, Georgia, and Troup County, Georgia are respondents herein. Shane Morris, the third defendant in the district court proceedings, is not a party to these proceedings, as petitioners do not complain of the Eleventh Circuit's ruling as applied to him.

Heather Leigh Boggs and Misty Leighann Boggs, by their next friend Diane Boggs Bowen [now Arrington], instituted this action on July 3, 1989. (R-1.) In their original Complaint, petitioners alleged a dangerous condition existed in the Troup County Jail which was conducive to hangings and claimed the alleged dangerous condition and the death of their father constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. (R-1, ¶¶9 and 10.) Consequently, these petitioners brought suit under 42 U.S.C. §1983 for the death of the deceased and sought to bring pendent state law claims alleging wrongful death, nuisance, and negligence.

Prior to the filing of responsive pleadings, a Recast Complaint was filed, which served only to drop certain parties defendant. (R-2.)

Through a Social Security Administration proceeding, it came to the attention of the parties that Deborah

Ogles McCormick had claimed to be the common law wife of the deceased and had claimed that petitioner Richard D. Boggs was the son of the deceased. (R-12.) Consequently, a joint motion for the joinder of Deborah Ogles McCormick and Richard D. Boggs was filed on January 17, 1990 on the basis that complete relief could not be accorded among the existing parties without a determination as to the relationships between Ms. McCormick, Richard D. Boggs, and the deceased.

The Rule 19 Motion was granted on February 17, 1990, and on February 5, 1990, Heather and Misty Boggs, by their next friend Diane Boggs Bowen, filed their Second Recast Complaint, in which they added as parties defendant Richard D. Boggs and Deborah Ogles McCormick. (R-13; R-15.) The claims against Sheriff Jones, Troup County and Shane Morris did not change from those asserted in the original Complaint, but a new claim was asserted seeking a determination as to whether Richard D. Boggs was the minor child of the deceased and whether Deborah Ogles McCormick was the wife of the deceased. Deborah Ogles McCormick did not respond to the Second Recast Complaint served upon her, and a default judgment was entered against her on July 19, 1990. (R-25.)

By Consent Order filed December 10, 1990, the parties were realigned so that Richard D. Boggs became a plaintiff by his next friend Sara A. Critcher. (R-29.) Again, no new or additional claims were asserted against Sheriff Jones, Troup County or Shane Morris by virtue of the Consent Order.

For more than twenty-one (21) months, the parties engaged in written and deposition discovery as to the claims set forth in the original Complaint, the Recast Complaint and the Second Recast Complaint. On April 15, 1991, the very day on which discovery, as extended, ended in this case and more than twenty-one (21) months and two Recast Complaints after the filing of the original Complaint, petitioners served their motion for leave to file yet a Third Amended Complaint and to add, *inter alia*, a claim for violation of due process under the Fourteenth Amendment to the Constitution of the United States. (R-35.)

Defendants below opposed the motion for leave to amend (R-40), and on May 6, 1991, filed their Motion for Summary Judgment. (R-42.) Petitioners filed their Brief in Response to the Motion for Summary Judgment on May 28, 1991. (R-45.) Defendants' Reply Brief and Objection to the Affidavit of Anthony Lollis were filed on June 17, 1991. (R-47.)

The district court's Order denying the motion for leave to amend was entered on or about July 2, 1991. (R-48.) On July 18, 1991, the district court granted defendants' Motion for Summary Judgment, and judgment thereon was entered on July 31, 1991. (R-50; R-52.) It was from these two Orders that petitioners appealed to the United States Court of Appeals for the Eleventh Circuit. (R-54.)

On April 21, 1992, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's grant of summary judgment as to respondents and rejected

petitioners' argument that, even in the absence of knowledge of an inmate's suicidal intent, the failure to correct an alleged dangerous condition constitutes deliberate indifference as opposed to mere negligence. This is the issue pending before this Court in the Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

On June 23, 1988, the Magistrate's Court of Troup County issued a warrant for the arrest of Richard Lee Boggs for the murder of Charlie Wayne Jacks. (R-42, Affidavit of Sheriff Elton Eugene Jones, ¶2 [hereinafter "Jones Affidavit"].) Pursuant to the arrest warrant, Boggs was arrested and booked into the Troup County Jail on the same date. (*Id.* at ¶3.)

Throughout the period of detention in question, Boggs' actions gave no indication that he suffered from mental problems or harbored suicidal tendencies. Indeed, petitioners do not contend that respondent Jones had any knowledge that Boggs was a suicide risk. (Petition for Writ of Certiorari, p. 22.)

On July 6, 1988, almost two weeks after his incarceration, Richard Lee Boggs died in the Troup County Jail. (R-42, Jones Affidavit, ¶12.) On that date, Boggs had not been indicted for the murder of Charlie Wayne Jacks but was being held in the Troup County Jail pursuant to the arrest warrant. (*Id.* at ¶13; R-46, Deposition of Elton Eugene Jones, p. 34.)

Prior to the death of Boggs, neither Sheriff Jones nor any other personnel of the Troup County Sheriff's Department was told or otherwise on notice of any mental problems, past suicide attempts or present suicidal intentions on the part of Boggs. (R-42, Jones Affidavit, ¶¶14 and 15.) This was true both as to the period of incarceration during which Boggs died, as well as his previous detention in the Troup County Jail. (*Id.* at ¶¶14-16.) Additionally, prior to that time, Morris had no knowledge of any prior hangings in the Troup County Jail. (R-46, Morris Deposition, pp. 31-32.)

RESPONDENTS' ARGUMENT AGAINST THE GRANTING OF A PETITION FOR WRIT OF CERTIORARI

Rule 10 of the Rules of the Supreme Court of the United States sets forth the basis upon which a Writ of Certiorari may be granted. The Rule reads in pertinent part:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . as to call for an exercise of this Court's power of supervision.

U.S. Sup. Ct. Rule 10.

Despite petitioners' assertions to the contrary, there are no compelling reasons to justify the granting of a Writ of Certiorari with regard to the opinion of the United States Court of Appeals for the Eleventh Circuit in *Boggs v. Jones*, No. 91-8701, slip op. (11th Cir., April 21, 1992) [hereinafter "Boggs Appellate Decision"]. The Boggs Appellate Decision is not in conflict with the decisions of the various circuit courts of appeal. Moreover, as will be discussed below, the Boggs Appellate Decision is not in conflict with the decisions cited by petitioners in support of their reasons for granting the writ of certiorari.

Petitioners first argue, at pages 16-20 of their Petition, that there is a split among the circuits as to whether a failure to correct a dangerous condition of confinement, without more, constitutes mere negligence or deliberate indifference. Petitioners contend that the Third Circuit comes down in favor of a finding of deliberate indifference, while the Sixth, Eighth and Eleventh Circuits hold such conduct to be, at most, negligence. Contrary to petitioners' arguments, however, the two cases they cite, *Colburn v. Upper Darby Township*, 838 F.2d 663 (3rd Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), and *Bielevicz v. Dubinon*, 915 F.2d 845 (3rd Cir. 1990), as well as other Third Circuit cases, do not depart from the holdings of other circuits that such conduct constitutes, at most, negligence. Indeed, the Third Circuit has *followed* the precedent of other circuits, including the Eleventh Circuit.

For example, in *Colburn*, the decedent, who was visibly intoxicated, was searched and placed into a jail cell. Approximately four hours later, the decedent shot herself with a handgun. Plaintiff alleged that defendants were negligent and/or reckless in searching the deceased and

that they had exhibited a custom of laxity regarding the supervision and monitoring of jail cells and in searching individuals taken into police custody. *Colburn*, 838 F.2d at 665.

Notably, in *Colburn*, as opposed to the instant proceedings, it was alleged that the defendants knew or had reason to know from their observation that the decedent was a suicide risk.

> Of course, we agree that custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide. On the other hand, if such officials know or should know of the particular vulnerability to suicide of an inmate, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability.

Colburn, 838 F.2d at 669.

Because the motion on review by the Third Circuit in *Colburn* was a motion to dismiss, the court was called upon only to rule upon the sufficiency of the Complaint. The court was reluctant at that stage of the proceedings to state that the Complaint could not be maintained, even though it recognized that "it may be difficult for plaintiff to prove the 'nexus' between the policy (inadequate monitoring of jail cells) . . . and the infringement of constitutional rights." *Id.* at p. 672.

The *Colburn* case made its way to the Third Circuit a second time, after the district court subsequently granted defendants' motion for summary judgment. *Colburn v. Upper Darby TP.*, 946 F.2d 1017 (3rd Cir. 1991) [hereinafter

referred to as "*Colburn II*"]. In affirming the grant of summary judgment, the Third Circuit first noted that:

> . . . a plaintiff in a prison suicide case has the burden of establishing three elements: (1) the detainee had a "particular vulnerability to suicide," (2) the custodial officer or officers knew or should have known of that vulnerability, and (3) those officers "acted with reckless indifference" to the detainee's particular vulnerability.

Colburn II, 946 F.2d at 1023

As to the first element, the court noted that neither due process nor the Eighth Amendment imposes liability for a negligent failure to protect a detainee from self-inflicted injury.

> Instead, the requirement of reckless or deliberate indifference implies that there must be a "strong likelihood rather than a mere possibility that self-inflicted harm will occur." *See, e.g., Torraco v. Maloney*, 923 F.2d 231, 236 (1st Cir. 1991); *Popham v. City of Talladega*, 908 F.2d 1561, 1563 (11th Cir. 1990).

Colburn II at 1024. Consequently, rather than being at odds with the holdings of the Eleventh Circuit, as petitioners would have this Court believe, *Colburn* and *Colburn II* actually are in harmony with, and find support in, Eleventh Circuit case law.

The second case cited by petitioners in support of the proposition that the simple failure to correct what is arguably a defect can, without more, amount to deliberate indifference, *Bielevicz v. Dubinon*, 915 F.2d 845 (3rd Cir. 1990), is entirely inapposite. In *Bielevicz*, plaintiffs who

had been arrested for public intoxication, complained of an unconstitutional policy and practice of the City of Pittsburgh of arresting people on pretextual charges of public drunkenness, locking them up for several hours, and releasing them without making charges or holding a hearing. This case has nothing whatsoever to do with conditions of confinement or with suicide.

Petitioners' second argument in favor of the granting of the writ of certiorari is that, while respondents may not have known of Boggs' suicidal intent, they nevertheless owed a duty to a class of potential suicide victims. Petitioners assert that the Third Circuit and, possibly, the Fifth Circuit endorse such a view, which they claim is in conflict with opinions of the First, Fourth, Sixth, Eighth and Eleventh Circuits. Such simply is not the case.

Petitioners rely on the Third Circuit's opinions in *Colburn* and *Bielevicz* to support their claim that generalized indifference to a class of potential suicide victims violates the Fourteenth Amendment. However, neither *Colburn* nor *Bielevicz*, which has nothing to do with jail suicide, support such a proposition. In fact, in *Colburn II*, the "class" argument specifically was *rejected*. *Colburn II*, 946 F.2d at 1028-29.

The next case relied on by petitioners in support of their "class" theory, *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3rd Cir. 1991), involved an individual, Simmons, taken into protective custody for public intoxication. On arrival at the jail, Simmons was upset and crying, confused, and deeply concerned about his arrest and its consequences. Simmons was placed alone in a cell and found approximately one and one-half hours later

hanging from the bars of the cell from a noose he had made from his own trousers.

In the ensuing civil rights complaint, plaintiff complained of deliberate indifference to the serious medical needs of intoxicated detainees and of failure to train officers responsible for intoxicated detainees in suicide detection and prevention. As stated above, these issues are not present in this litigation.[1]

Lastly, petitioners suggest that the Fifth Circuit has embraced the concept of a duty owed toward a class of suicidal inmates and cite as support *Burns v. City of Galveston, Texas*, 905 F.2d 100 (5th Cir. 1990). In that case, the deceased was arrested for public intoxication, whereupon he became belligerent. His conduct was considered typical of an intoxicated detainee, but not reflective of mental illness or suicidal tendencies. Shortly after having been placed in a cell, the deceased yelled that if he did not get a cigarette he would kill himself. Thereafter, he continued to beat on the walls and to yell at the officers

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[1] Indeed, based on this Court's ruling in *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321 (1991), the Third Circuit noted that in order to establish that the city was deliberately indifferent, plaintiff must have adduced scienter-like evidence of the deliberate indifference of specific policy makers. *Simmons*, 947 F.2d at 1064, n.20. Moreover, the court also reiterated that custodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide but that the Fourteenth Amendment imposes on individuals who know or should know of the particular vulnerability to suicide of an inmate an obligation not to act with reckless indifference to that vulnerability. *Id.* at 1068, n.23.

to bring a cigarette to him. Within an hour after having been placed in the cell, the deceased was found hanging.

The plaintiff, the mother of the deceased, brought her civil rights action alleging that the city had a custom of deliberate indifference toward the medical needs of suicidal detainees and a policy of inadequately training its officers in its medical procedures. On motion for summary judgment, the district court dismissed the federal claim.

In affirming the grant of summary judgment, the Fifth Circuit focused on the needs of the individual detainee.

> It is one thing to require a municipality to train its police officers to recognize and not ignore obvious medical needs of detainees with known, demonstrable and serious mental disorders. It is quite another to require as a constitutional minimum that a municipality train its officers to medically screen each pretrial detainee so that the officers will unerringly detect suicidal tendencies.

Burns, 905 F.2d at 104. Thus, the Fifth Circuit's holding in *Burns* does not support petitioners' contention that the Fourteenth Amendment imposes a duty on jail officials as to a class of inmates as opposed to individual inmates. Consequently, *Burns* also is not in conflict with the holdings of other circuits on this point.

Rule 10 of the Rules of the Supreme Court of the United States does not mandate certiorari in all cases. Rule 10 merely states that "[a] petition for writ of certiorari will be granted only when there are special and

important reasons therefor." Petitioners herein have demonstrated no special or important reasons for the granting of the petition for a writ of certiorari. Contrary to petitioners' assertions, the Boggs Appellate Decision is not in conflict with the decisions of other circuits. Accordingly, the petition for writ of certiorari should be denied.

DISCUSSION

NEITHER RESPONDENT WAS DELIBERATELY INDIFFERENT TO ANY SERIOUS MEDICAL NEED OF THE DECEASED; THUS, THE GRANT OF SUMMARY JUDGMENT WAS APPROPRIATE

A. Elton Eugene Jones is Not Liable in His Individual Capacity

The evidence is uncontroverted that respondent Jones had no actual knowledge of the decreased's ever having exhibited any suicidal tendencies. (R-42, Jones Affidavit ¶¶14 through 16; Petition for Writ of Certiorari, p. 22.) Nevertheless, petitioners contend that he violated the deceased's Fourteenth Amendment rights simply because 1) there had been prior hangings from exposed pipes in the Troup County Jail,[2] and 2) he had failed to

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[2] Petitioners misstate the facts when they assert that Boggs' death "was the fourth in a series of deaths by hanging between 1985 and 1988." (Petition for Writ of Certiorari, p. 9.) They also misstate the facts when they assert that there were "three prior hangings or attempted hangings in a same or similar manner." (*Id.* at p. 16.) Indeed, as petitioners finally concede, there was only *one* prior death by hanging in the same or similar manner at the Troup County Jail. (*Id.* at p. 30.)

cover the pipes to ensure that inmates could not use them as a means of committing suicide. (Petition for Writ of Certiorari, pp. 30-31.) The case law is clear – this alone does not rise to the level of "deliberate indifference" required to support a Fourteenth Amendment claim against Jones in his individual capacity. There is no split of authority among the circuits on this issue.

In the case of *Popham v. City of Talladega*, 908 F.2d 1561 (11th Cir. 1990), the Eleventh Circuit affirmed the district court's grant of defendants' summary judgment motion in a case involving the jail suicide of the plaintiff's husband. In so doing, the court noted that in the context of jail suicides, an allegation of deliberate indifference must be considered in light of the knowledge possessed by the officials involved as to the inmate's suicidal tendencies. *Popham*, 908 F.2d at 1564. The Court further recognized that "[a]bsent knowledge of a detainee's suicidal tendencies, the cases have consistently held that failure to prevent suicide has never been held to constitute deliberate indifference." *Id.*

Judge Hall of the Northern District of Georgia, in *McDay v. City of Atlanta*, 740 F.Supp. 852 (N.D. Ga. 1990), *affirmed*, 927 F.2d 614 (11th Cir. 1991), also found in favor of the defendants in a jail suicide case where defendants had never known the deceased to attempt or threaten to commit suicide and noted "courts have typically required that defendants have knowledge that the detainee was a suicide risk before they can be charged with deliberate indifference." *McDay*, 740 F.Supp. at 857.

Moreover, the Eleventh Circuit in *Edwards v. Gilbert*, 867 F.2d 1271 (11th Cir. 1989) reversed the district court's

denial of defendants' motion for summary judgment and stated:

> In the absence of a previous threat of or an earlier attempt at suicide, we know of no federal court in the nation or any other court within this circuit that has concluded that official conduct in failing to prevent a suicide constitutes deliberate indifference.

Edwards v. Gilbert, 867 F.2d at 1275 (11th Cir. 1989). *See also Schmelz v. Monroe County*, 954 F.2d 1540, 1544-45 (11th Cir. 1992); *Colburn v. Upper Darby TP.*, 946 F.2d 1017, 1023-24 (3rd Cir. 1991) (affirming grant of summary judgment to defendants); *Bell v. Stigers*, 937 F.2d 1340, 1343 (8th Cir. 1991) (reversing district court's denial of summary judgment); *Belcher v. Oliver*, 898 F.2d 32 (4th Cir. 1990) (reversing district court's denial of defendants' motion for summary judgment); *Williams v. Borough of West Chester, Pennsylvania*, 891 F.2d 458 (3rd Cir. 1989) (affirming grant of summary judgment to defendants); *Danese v. Asman*, 875 F.2d 1239 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990) (reversing denial of defendants' summary judgment motion); *Estate of Cartwright v. City of Concord, California*, 856 F.2d 1437 (9th Cir. 1988) (affirming judgment for defendants).

To accept petitioners' view of what constitutes a Fourteenth Amendment violation would mean that an inmate has an *absolute right* to be protected from committing suicide or from other types of harm while incarcerated, regardless of whether the officers had reason to know that such harm was likely to occur. There is no such right under the United States Constitution.

For example, in *Belcher v. Oliver, supra,* a pre-trial detainee hanged himself with his belt while detained at the city jail on charges of public intoxication and hazardous driving. The jail officials failed to remove the detainee's belt and shoes from him before placing him in the cell, in violation of the jail's normal procedure to do so. Nevertheless, there was no deliberate indifference and no constitutional violation found to occur because the officials had no reason to suspect the detainee was a suicide risk.

> Plaintiff's theory of this case would result in an absolute right to be protected from committing suicide or from other sorts of harm while incarcerated, regardless of whether the officers had reason to know that such harm was likely to occur. The Eighth and Fourteenth Amendments do not contemplate liability upon the premise that all self-inflicted harm is someone else's fault. . . . That arguably negligent actions do not support a claim for cruel and unusual punishment is consistent with the purpose of the Eighth Amendment – to prohibit inhumane methods of punishment and assure appropriate standards of decency in a setting of detention. . . . We do not for one moment dismiss the pain of these events for those involved. We hold only that their tragic character cannot be ameliorated by efforts to affix constitutional blame where it does not belong.

Belcher v. Oliver, 898 F.2d at 36 (citations omitted).

Furthermore, in *Freedman v. City of Allentown, Pennsylvania,* 853 F.2d 1111, 1115 (3rd Cir. 1988), the court affirmed the dismissal of the complaint of the parent of an inmate whose son had committed suicide while

detained in jail. In *Freedman*, unlike the case before this Court, there were indications the inmate had suicidal tendencies, but the police officers were, at most, negligent in failing to recognize them. *Id.* at 1116. Relying on *Hudson v. Palmer*, 468 U.S. 517 (1974), the Third Circuit recognized that "a prison custodian is not the guarantor of a prisoner's safety" and refused to "infer from the prisoner's act of suicide itself that the prison officials . . . recklessly disregarded their obligation to take reasonable precautions to protect the safety of prisoners entrusted to their care." *Freedman*, 853 F.2d at 1115. *Accord, Gagne v. City of Galveston*, 805 F.2d 558, 559 (5th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987) ("the arresting officer was not under a clearly established constitutional duty to discover the prisoner's suicidal tendencies *or to deprive him of the means of killing himself*") (emphasis supplied).

While others may have committed suicide in the Troup County Jail prior to the death of Boggs, that fact alone is not enough to sustain petitioners' claim against respondent Jones individually. Consequently, he is entitled to summary judgment on plaintiffs' §1983 claim.

B. Elton Eugene Jones is Entitled to Qualified Immunity

Respondents submit it was objectively reasonable for Jones to believe his actions did not violate any clearly established right of the deceased. As stated in *Anderson v. Creighton*, 483 U.S. 635 (1987):

> It should not be surprising, therefore, that our cases establish that the right the official is

> alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson v. Creighton, 483 U.S. at 640.

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this Court adopted an objective test, susceptible to summary judgment disposition. As the law presently exists, unless it can be established by objective evidence that the defendant violated the deceased's "clearly established constitutional rights," then the defendant generally is entitled to summary judgment on the basis of qualified immunity.

In *Edwards v. Gilbert,* 867 F.2d 1271 (11th Cir. 1989), an inmate who had never threatened or attempted suicide and who had never been considered a suicide risk, was left in a secure cell for forty-five (45) minutes during which time he committed suicide. The court concluded a reasonable officer in the defendants' positions could have believed he was acting consistently with the Constitution and directed that summary judgment be entered on the basis of qualified immunity.

The result should be the same here. Jones knew the deceased had been in the Troup County Jail for approximately two (2) weeks prior to the date of his death, during which time he had exhibited no unusual behavior (R-42, Jones' Affidavit, ¶¶14 and 15); the deceased received visits from relatives and acquaintances while he was in the Troup County Jail, none of whom reported any unusual behavior (*Id.*); the deceased informed jail officials he had never been treated for a mental condition

(R-42, Exhibit D to Jones Affidavit); and while detained in the Troup County Jail, the deceased participated in store-call on several dates, *including the date of his death.* (R-42, Exhibit F to Jones Affidavit.)

Furthermore, the deceased had been confined at the Troup County Jail on prior occasions, and during none of those periods of confinement did he indicate to Jones or any jail personnel that he had mental problems, that he had attempted to commit suicide or that he was considering committing suicide. (R-42, Jones Affidavit, ¶16.) On this objective evidence, and the petitioners' admission that Jones did not know of Boggs' suicidal intent (Petition for Writ of Certiorari, p. 22), Jones' actions with respect to the deceased were reasonable and entitle him to summary judgment based on qualified immunity.

C. Neither Elton Eugene Jones in His Official Capacity Nor Troup County, Georgia is Liable to Petitioners

Petitioners assert that Shane Morris, who is not a respondent in this proceeding, knew of Boggs' intent to kill himself. (Petition for Writ of Certiorari, pp. 12-13.) Even assuming there were facts which indicated Morris had knowledge of the deceased's suicidal intentions, summary judgment still was appropriate as to respondents Jones, sued in his official capacity, and Troup County. This is because under §1983, there is no *respondeat superior* liability. *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 694-95 (1978). Assuming *arguendo* that Morris violated the deceased's rights under §1983, neither Jones nor Troup County is liable simply

because Morris was employed as a Deputy of the Troup County Sheriff's Department.

"Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Monell*, 436 U.S. at 694. In this case, petitioners' damages, if any, were not proximately caused by any such policy or custom. They were proximately caused by the acts of the deceased, whose intentions to commit such acts were unknown and unforeseen by these respondents.

Petitioners, however, contend the allegedly wrongful failure of these respondents to cover up certain pipes in the Troup County Jail constitutes a policy or custom on which the liability of Jones in his official capacity and Troup County may be based. Respondents disagree. The decision by Jones not to cover these pipes was made in the sound discretion of one whose job it was to administer the Jail. It is, therefore, no more than a condition of confinement claim. However, the touchstone of any suit alleging constitutional violations as a result of certain conditions of confinement is the notion that "courts are ill-equipped to deal with . . . problems of prison administration. . . . " *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).

Thus, prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547

(1979). "[A] court must not substitute its views for those of legislators and jail administrators; [rather] it must limit its inquiry to the issue of whether conditions of confinement violate a prohibition of the Constitution." *Hamm v. DeKalb County*, 774 F.2d 1567, 1571 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986).

> As a general matter, a State is under no constitutional duty to provide substantive services for those within its border. . . . When a person is institutionalized – and wholly dependent on the State . . . a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities.

Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (citations omitted).

As to the scope of those responsibilities, there can be no doubt but that the State must provide adequate food, shelter, clothing, and medical care. It must also provide reasonable safety for all residents and personnel within the institution. *Youngberg*, 457 U.S. at 324. "In determining whether the State has met its obligations in these respects, decisions made by the appropriate professional are entitled to a *presumption of correctness.*" *Id.* (emphasis added). Thus, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg*, 457 U.S. at 323.

There is no such showing here. To the contrary, Jones considered whether or not to cover these pipes, but reasonably concluded the ongoing risk associated therewith outweighed the remote chance an inmate would hang himself from them. Jones considered the possibility of covering the pipes with some kind of wood, some kind of metal, or some kind of plastic. (R-46, Jones Deposition, p. 27.) Since all three of these materials can be used by an inmate to harm himself or to jeopardize the security of the jail, nothing was done about putting a cover over the pipes. (*Id.*) The decision was *not* based, as petitioners contend at p. 30 of the Petition, on a determination that repairs would be too expensive.

The case of *Wayland v. City of Springdale, Arkansas*, 933 F.2d 668 (8th Cir. 1991) is particularly instructive. In that case, an arrestee hanged himself from air vent louvers put to the same use by another inmate less than four years before. Wayland had not displayed any unusual emotions or suicidal tendencies during his stay in jail, but the plaintiff argued that the mere failure to take any corrective actions to modify the air vent and cell environment constituted deliberate indifference in violation of the Fourteenth Amendment. The district court granted summary judgment to defendants and the Eighth Circuit affirmed, noting that the failure to change the air vents could not establish anything other than negligence. Respondents submit that the same result should obtain here.

Finally, in *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321 (1991), this Court recently held that, to show an Eighth Amendment violation for the conditions of confinement, an inmate must show that some governmental official

subjectively acted with deliberate indifference toward the right of the inmate. This Court found no significant distinction between claims alleging inadequate medical care and those alleging inadequate conditions of confinement. Thus, the standard imposed should be one higher than that of mere negligence. *Daniels v. Williams*, 474 U.S. 327 (1986).

CONCLUSION

The Petition for Writ of Certiorari should be denied in this matter, because the justiciable concerns required by Rule 10 of the Rules of the United States Supreme Court are not present. There is no conflict between the circuits. The Eleventh Circuit's analysis is entirely consistent with the established precedent of this Court and of the other courts of appeal.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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